

SMITH HILL VENTURES, INC.

IBLA 97-264

Decided May 19, 1999

Appeal from a decision issued by the Colorado State Office, Bureau of Land Management, declaring mining claim null and void. CMC-246554.

Set aside and referred for hearing.

1. Evidence: Burden of Proof--Rules of Practice: Appeals:
Burden of Proof

When titles based upon townsite patents remain unchallenged for many years, they will not be disturbed upon a challenge by a mining claimant who has located a claim many years after the townsite patent has issued, except on the clearest proof that the area within the townsite patent claimed by the mining claimant was known to be mineral in character to an extent sufficient that complete title to the disputed land could not have passed under the townsite patent.

2. Mining Claims: Lands Subject to--Townsites

When a mining claimant claiming land described in a townsite patent makes a prima facie showing that when the townsite patent was issued the land being claimed was known to be mineral and held under valid mineral location, the matter will be referred to Hearings Division for a hearing as to the character of the land and existence of a claim when the townsite patent was issued.

APPEARANCES: Craig L. Burton, Vice President, Smith Hill Ventures, Inc., Lakewood, Colorado; Terri L. Anderson, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Lakewood, Colorado, for the Bureau of Land Management; James S. Maloney, Esq., and Kendra L. Carberry, Esq., Denver, Colorado, for the City of Black Hawk, Colorado.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Smith Hill Ventures, Inc. (Smith Hill), has appealed a February 7, 1997, decision issued by the Colorado State Office, Bureau of Land Management (BLM), declaring the Juliana No. 1 placer mining claim, CMC 246554,

null and void ab initio. The Juliana No. 1 claim was located in sec. 7, T. 3 S., R. 72 W., Sixth Principal Meridian, Gilpin County, Colorado, on March 4, 1994, and the notice of location for the claim was recorded with BLM on May 25, 1994.

On October 11, 1996, BLM issued a notice to Smith Hill, giving Smith Hill 30 days to produce documentary evidence to refute BLM's finding that the land subject to the Juliana No. 1 claim had been conveyed from Federal ownership by Townsite Patent No. 146, which had been issued to the City of Black Hawk, Colorado, on April 25, 1877. The precedent of Norman R. Blake, 119 IBLA 141 (1991), was cited by BLM as establishing the criteria for determining whether a mining claim can be located within a townsite patent.

The patent document for Patent No. 146 stated that: "No title shall be hereby acquired to any Mine of Gold, Silver, Cinnabar, or Copper or to any Valid Mining Claim or possession held under existing Laws of Congress." This proviso is derived from two laws enacted in 1867 and 1868. The 1867 statute provided for the patent of public domain lands to towns for the benefit of the inhabitants, but provided that "no title shall be acquired under the provisions of this act, to any mine of gold, silver, cinnabar, or copper." 14 Stat. 541, 542. The following year, Congress amended the 1867 proviso by adding, among other things: "And provided further, That no title under said act of March two, eighteen hundred and sixty-seven, shall be acquired to any valid mining claim or possession held under the existing laws of Congress * * *." 15 Stat. 67. Eventually, the two acts were combined and codified at 43 U.S.C. § 722 (1970) (repealed, Federal Land Policy and Management Act of 1976, § 703(a), 90 Stat. 2789).

Smith Hill submitted documents supporting its claim on November 7, 1996. In its February 7, 1997, decision, BLM held that the documents submitted by Smith Hill failed to establish the necessary facts:

Nothing contained within the historical record compiled and submitted in support of the Juliana No. 1 Placer mining claim indicates conclusively that: (1) Valid mining claims existed as of April 11, 1873 on the lands currently embraced by the Juliana No. 1 Placer mining claim, or (2) that a discovery of a valuable mineral deposit had been made and known to exist, as of the date of Townsite entry, on the lands embraced by the Juliana No. 1 Placer mining claim.

Evidence presented by Smith Hill Ventures, Inc., relative to mineralization, is nothing more than accounts of purported showings of isolated mineral with no indication as to quantity or extent. Furthermore, it is not clear from the newspaper accounts of the findings of isolated mineral, if they in fact had been made, that they were existent on the lands in question, lands currently embraced by the Juliana No. 1 Placer mining claim.

Based on this conclusion, BLM declared the Juliana No. 1 claim null and void ab initio.

On appeal, Smith Hill assails BLM's application of the burden of proof standard, "indicates conclusively." It contends that the "indicates conclusively" standard improperly construes the Board's ruling in Blake that the patent will not be upset "except on the clearest proof," and that the latter burden is an extension of the preponderance of evidence standard applied in most civil matters. Smith Hill further asserts that, contrary to BLM's determination, it did present evidence of discovery when it "submitted published reports of actual gold mining operations conducted" on gulch claims, "the best evidence that the mineral deposit was valuable." Smith Hill argues that those reports were not submitted to prove the quantity or extent of the mineralization, but were to show that the ground was known to be valuable for minerals when the patent was issued. Smith Hill also argues that BLM improperly failed to recognize that the gulch placers in the area of its claim were very rich, asserting that, in terms of today's dollars, miners retrieved about \$1,529 from one shaft on the Walker claims and \$1,152 per day from operations on the Hawes claims. Smith Hill contends that, contrary to BLM's declaration, it demonstrated that the mining operations it identified were within the area covered by the Juliana No. 1 claim. Addressing BLM's statement that there was no evidence that the land subject to the Juliana No. 1 claim was subject to a valid placer claim when the townsite entry was made, Smith Hill argues that considering the short period of time between the date the claims were known to exist and the date of townsite entry, the presumption is these claims were not abandoned in such a short period of time, particularly considering that assessment work requirements were not yet in place. Smith Hill finally asserts that the 7 months between the September 1872 newspaper report and the April 1873 townsite entry does not give rise to a presumption adverse to its position that the claims containing valuable mineral existed on the date of the townsite entry.

BLM has filed an answer and requests the Board "not to disturb * * * the title based upon a patent, presumptively complete, * * * when Smith Hill has failed to prove that the conflicting area was known, at the date of patented entry, to possess such a mineral character that complete title thereto could not be held to have passed to Blackhawk under the townsite patent." BLM suggests that the instant situation is very similar to that of the mining claimant in Norman R. Blake, *supra*.

We have not failed to note that Blake involved a mining claim located within the Black Hawk townsite patent. Similarly, the appellant in Blake did not claim its rights as a successor-in-interest to a claimant holding a claim when the townsite patent was issued. In both cases the location was made on the premise that title to the land upon which the claim was located did not pass to Black Hawk when the patent was issued and the land remained public land open to location. In Blake, at 143, the Board acknowledged three Departmental decisions acknowledging the ability to locate a new claim following issuance of townsite patents: Golden Center of Grass Valley Mining Co., 47 L.D. 25 (1919); Mill Site Lode, 39 L.D. 356

(1910); and Brady's Mortgagee v. Harris, 29 L.D. 426 (1900). Following this acknowledgement we ruled that before the Department can declare a mining claim located within the boundaries of a townsite patent null and void, the claimant must be afforded an opportunity to submit proof in support of the contention that the land was open to location. 119 IBLA at 144. At this point the facts in the Blake case and this case are not the same. Blake submitted no evidence. Smith Hill has submitted substantial evidence that valid mining locations supported by discovery of valuable mineral deposits existed near the time of the entry. BLM counterargues that it applied the correct standard when it determined that the historical records submitted by Smith Hill were insufficient.

[1] In Blake we quoted the following language from Mill Site Lode, 39 L.D. at 358, to explain what a mining claimant must show:

Conceding however, that the land was known at the date of the townsite entry to contain some mineral, that fact alone would not warrant a conclusion that it was excepted from the townsite patent; * * * and the Department has, in a number of cases recently decided, expressed its unwillingness to disturb, in favor of the lode mining applicants, titles based upon patents, presumptively complete, issued on townsites or placer entries where such patents, as appears to be the case here, had remained for many years unchallenged, except on the clearest proof that the conflicting area was known, at the time of the patented entry, to occupy such a status, or possess such a character, that complete title thereto could not be held to have passed thereunder.

(Emphasis added.) As noted, Smith Hill disagrees with BLM's application of the standard "clearest proof" as requiring more than the standard burden of persuasion by preponderance of the evidence. We find no merit in its argument. An authority no less than the Supreme Court of the United States has provided guidance in this matter:

The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to "instruct the fact finder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." In re Winship, 397 U.S. 358, 370 (1970), Harlan, J., concurring). The standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision.

Generally speaking, the evolution of this area of the law has produced across a continuum three standards or levels of proof for different types of cases. At one end of the spectrum is the typical civil case * * *. Since society has a minimal concern with the outcome of such private suits, plaintiff's burden of proof is a mere preponderance of the evidence. The litigants thus share the risk of error in roughly equal fashion.

In a criminal case, on the other hand, the interest of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment. * * * This is accomplished by requiring * * * that the state prove the guilt of an accused beyond a reasonable doubt. In re Winship, *supra*.

The intermediate standard, which usually employs some combination of the words "clear", "cogent," "unequivocal," and "convincing," is less commonly used, but nonetheless "is no stranger to the civil law." Woodby v. INS, 385 U.S. 276, 285 (1966). See also C. McCormick, Evidence § 320 (1954); 9 J. Wigmore, Evidence § 2498 (3d ed. 1940). * * * The interests at stake in those cases are deemed to be more substantial than mere loss of money and some jurisdictions accordingly reduce the risk to the defendant * * *.

Addington v. Texas, 441 U.S. 418, 423-24 (1978) (footnote omitted). ^{1/} Thus, the policy considerations as enunciated in Mill Site Lode support the application here of a "clear and convincing" burden of proof. See 29 Am. Jur. 2d, Evidence § 157 (1994).

Smith Hill's presentation focuses on two sets of gulch claims within the town of Black Hawk. The "Hawes" Gulch claims were located on July 5, 1869, to include 900 feet of Clear Creek between the Walker and Kenyan Mills. The local newspaper reported that in June 1870 four workers were removing about \$68 worth of gold per day from the claims. In August, the claims were sold for \$1,700. The "Walker" Gulch claims were located on April 30, 1870, westerly from the Hawes claims and alongside the Walker Mill. In February and March 1870, the local newspaper reported that rich gulch diggings had been struck.

However, nothing has been submitted regarding operations on the Hawes claims after the August 1870 sale. Further, nothing is reported about these claims after the local newspaper related that the miners on Clear Creek below Walker Mill suffered from a flood on the creek occurring September 3, 1872. The newspaper reported that on the Walker claims, "the strike petered out" in March 1870. We also note that the Walker claims, and the likely discovery, are to the west of where Smith Hill located the Juliana No. 1 claim.

^{1/} Despite its deliberate explanation, the Court opined:

"We probably can assume no more than that the difference between a preponderance of the evidence and proof beyond a reasonable doubt probably is better understood than either of them in relation to the intermediate standard of clear and convincing evidence. Nonetheless, even if the particular standard-of-proof catchwords do not always make a great difference in a particular case, adopting a `standard of proof is more than an empty semantic exercise.'" 418 U.S. at 425.

The townsite entry occurred on April 11, 1873, and a patent was issued on April 25, 1877. The Mining Law of 1872 had been enacted 5 years earlier and miners were required to perform assessment work on unpatented claims in 1877. There is nothing in the record showing that assessment had been performed on the Hawes or Walker claims after 1875. Mayor Deeds were subsequently issued for those lands now claimed by Smith Hill. Each of those deeds contain a statement that a notice of intent to convey the identified land had been published and that no adverse claims were lodged.

We find that the evidence before us indicates that the land embraced by the Juliana No. 1 claim was subject to the Hawes claims and that mining operations were being conducted on those claims in the early 1870's. 2/ The unanswered question remains: Did those claims still exist at the time of patent so as to exclude the subject lands? That is the issue of fact yet to be determined.

[2] In Blake, at 143, we cited the Golden Center of Grass Valley Mining Co. decision as establishing that claimants must be given an opportunity to present evidence on the issue whether land was excluded from a townsite patent. As a result of the evidence submitted by the claimant in Golden Center, that claimant was deemed to have made "a strong prima facie showing," and a hearing was ordered to determine "the local conditions in 1869," the date of the townsite entry. 47 L.D. at 27. We paraphrase U.S. v. Knoblock, 131 IBLA 48, 82, 101 I.D. 123, 141 (1994), to note that "if, upon the completion of the presentation, the evidence is such that, were it to remain unrebutted, a finding of in favor of the proponent would properly issue, a prima facie case has been established."

We consider similar conditions to exist here. Smith Hill has presented a prima facie showing that mineralization was recognized and claims existed a short time prior to the townsite patent. However, the record is still unclear as to whether the mineralization remained and the claims continued to exist when townsite entry was filed and when the patent was issued. Material facts are in dispute, and we deem it proper to refer this case to the Hearings Division for a hearing to determine these facts. See 43 C.F.R. § 4.415; Jules Wright, 137 IBLA 313 (1997); State of Alaska, 119 IBLA 260 (1991). The Administrative Law Judge assigned to the case shall issue a decision which will be final for the Department in the absence of a timely appeal to this Board.

2/ Smith Hill has reduced the size of the Juliana No. 1 claim by amendment several times since initiating this appeal. The Juliana No. 1 claim now embraces the area 10 feet north of the Clear Creek northern bank to the north boundary of Gilpin County Casino's parking lot (about 10 to 20 feet south of Clear Creek's southern bank) with a western boundary about 150 feet east of the bridge over Clear Creek near where the Walker Mill once stood and an eastern boundary determined by the Mill Site #42 Sanitation District property. As a result, the only known conflict between the claim and property subject to a recorded deed concerns the right-of-way deed for State Highway No. 119.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is set aside and the case is referred to the Hearings Division.

R.W. Mullen
Administrative Judge

I concur:

C. Randall Grant, Jr.
Administrative Judge